

ABATEMENT, WITHDRAWAL
AND
DISMISSAL OF SUITS

09, 22, 23

- ↳ Abatement means suspension or termination of proceedings in an action for want of proper parties.
- ↳ In execution proceedings (deceased) R 3, 4 and 5 of Order 22 of CPC shall not apply.
- ↳ The death of a plaintiff or defendant shall not cause the suit to abate if right to sue survives [O 22 R 1]
- ↳ A pleader has a duty to inform the court about the death of the parties [O 22 R 10 A]
- ↳ The court can grant exemption to the plaintiff from the necessity to substitute the legal representative of any defendant who died during the pendency of the suit and proceed to pronounce judgment:- [O 22 R 4 (4)]
 - The defendant has remained ex parte
 - The defendant has failed to file written statement
 - The defendant having filed the written statement, has failed to appear and contest at the hearing.
- ↳ The suit cannot abate by reason of death
- ↳ O 22 R 6: The suit cannot abate by reason of death of either party if the death occurs after the conclusion of hearing. Also, judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place.

- ↳ where on the death of a defendant the right to sue survives against the other surviving defendant alone, the case may proceed against the, surviving defendant. [R2]
- ↳ where on the death of a defendant the right to sue does not survive against the other surviving defendant alone, the case shall abate against the deceased defendant if no application is made within the time limited by law for the legal representative of the deceased defendant to be made a party. [R4]
- ↳ There shall be no abatement by reason of death of either party between the conclusion of the hearing and the pronouncing of the judgment. [R6]
- ↳ withdrawal of suits is governed by O 23 R1 CPC.
- ↳ or abandonment of part of claim
- ↳ The plaintiff may abandon his suit at any time after the institution of suit.
- ↳ Right to withdraw the suit is an absolute right of the plaintiff. O 23 R1(1)
- ↳ After withdrawal of suit, the plaintiff can ^{NOT} institute a fresh suit in respect of the same subject matter only with the leave of the court or unless liberty is given at the time of withdrawal of the suit.

O 23
R3

↓
withdrawal
and adjustment
of suits

- There must be some formal defect
- There are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim.

↳ 023 R(1) : At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim.

↳ If the plaintiff wants to withdraw the suit, then:-
• the plaintiff can withdraw against all the defendants if there are more than one, against some of the defendant if there are more than one, against any one of the defendants.

↳ EFFECT OF ABATEMENT OR DISMISSAL OF SUIT : 022 R9

↳ withdrawal of suit or abandonment of claim causes two types of cases:-

- (i) withdrawn without leave of court : R(1), 4
- (ii) withdrawal with leave of court : R(3)

↳ compromise of suit : Rules 3-3-B, 0-23

- where the court is satisfied that a suit has been adjusted wholly or in part by any lawful agreement in writing and signed by the parties. OR
- where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall record such agreement, compromise or satisfaction and pass a compromise decree accordingly.

conditions for
COMPROMISE

- There must be an agreement or compromise
- It must be in writing and signed by the parties
- It must be lawful not voidable under ICA. (RSA)
- It must be recorded by the court
- A compromise (consent decree) must have been passed.

↳ Representative suit O.23 R3-B

No agreement or compromise in a representative suit can be entered into without the leave of the court. Before granting such leave, notice to the persons interested should be given by the court.

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↳ Bar to suit: R3-A, O.23

No suit can be filed to set aside a compromise decree on the ground that it is not lawful.

↳ No appeal lies against a decree passed by the court with consent of parties nor a suit can be instituted to set aside a compromise decree. ↳ O.22 applies to APPEALS (B11) but not to execution proceedings

↳ The provisions of O.22 are exhaustive. [Bhagwan Swaroop v. Mool Chand]

↳ Order 22 deals with the creation, assignment or devolution of interest during the pendency of suits.

- Death of a party (R1-6, O-A)
- Marriage of a party (R7)
- Insolvency of a party (R8)
- Assignment of interest (R10)

↳ O1XR2 deals with dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs.

↳ O1XR3 deals with where neither party appears, suit to be dismissed.

↳ The interim order passed in a suit that was dismissed for default will revive after the suit is restored.

↳ Therefore, ^{also} suit may be dismissed where summons are not served on the defendant in consequence of the failure of the plaintiff to take proper steps like filing of court fees, postal charges or requisite number of copies of plaint. Plaintiff, after summons to the defendant has returned unserved, fails to apply for fresh summons for seven days.

↳ Under O 18 R 7-11 : where only defendant appears

- Dismissing of suit order.
- R 8 enacts that if the defendant admits the plaintiff's claim as a whole or a part thereof, the court will pass a decree against the defendant upon such admission and dismiss the suit for the rest of the claim.

This rule will apply to a case where there is only one plaintiff and he does not remain present or there are two or more plaintiffs and all of them remain absent. [Kulendra Kishore v. Rai Kishori Shaha (1922)]
In this case R 10 will apply, where there are two or more plaintiffs and one or more of them appear and the others do not appear, the court may permit the suit to proceed as if all the plaintiffs had appeared.

- R 9 : Prohibits the plaintiff thereafter from filing a fresh suit on the same cause of action.
He may, apply for an order to set aside the order of dismissal.

↳ Where only plaintiff appears: R6
Issue summons, court may proceed ex parte.

Remedies against ex parte decree:-

- To apply to the court by which such decree is passed to set it aside OR 9 R 13
- Prefer an appeal against such decree 96(2) or to file revision under Section 115 where no appeal lies.
- File a suit on the ground of fraud [Rupchand Gupta v. Raghuwanshi 1984].
- To apply for revision: 047 R1

↳ The remedy of the plaintiff is to file an appeal against the order dismissing the suit under 017 R 3.

↳ OR 9 R 9, 011 R 21(2), 022 R 9 - Provisions which preclude plaintiff;
↳ no fresh suit to be brought on the same cause of action

↳ Who may file written statement?
 Defendant (s), duly constituted agent

↳ When written statement may be filed? R1

A defendant, within thirty days from the service of summons on him, present a written statement of his defense. The said period, however, can be extended upto to ninety days, in case of failure of filing the written statement within 30 days. [Proviso to O8R1]. It can be granted only for exceptional circumstances.

↳ Set-off: Rule 6 [Legal set-off - always an ascertained sum of money
 Equitable set-off - O20 R19(3)]

• O8R6 deals with legal set-off. but the said provision is not exhaustive and does not take away the power of the court to allow such adjustments independent of Rs of O8. It is known as equitable set off. E.S.O., is allowed by the courts of equity in England, may be claimed by the defendant in respect of even an unascertained sum of money, provided that both the cross-demands arise out of one and the same transaction or are so connected, in the nature and circumstances, that they can be looked upon as parts of one transaction.

[Stephen Clark v. Rutherford-Schultz]
1865

↳ Counterclaim Rules [6-A]-[6-G]

• Cross action, in addition to his right to plead a set-off, set up a counterclaim. It may be set up only in respect of a claim for which the defendant can file a separate suit.

There are three modes of pleading or setting up a counterclaim in a civil suit:-

- In the written statement filed under O.8R1
- By amending written statement with the leave of the court and setting up counterclaim
- In a subsequent pleading under O.8R9 [not more than 30 days].
- ↳ Specific Denial R3
- ↳ Inconsistent pleas can be raised by defendants in the written statement. [Baldan Singh v. Manohar Singh, 2009]
- ↳ Doctrine of Non-Transverse incorporated under O.8R5 CPC where a material averment is passed over without specific denial, it is taken to be admitted.
- ↳ Duty of defendant to produce documents upon which relief is claimed by him [O.VIII RB-A].
- ↳ He must raise by his pleading all matters which show that the suit is not maintainable or that the transaction is either void or voidable in point of law, facts showing fraud, illegality, fraud, limitation, release payment performance [O8R2]
- ↳ Where the defendant relies upon several distinct grounds of defence founded upon separate and distinct facts, they must be stated separately and distinctly. [O8R7] { Also grants additional relief O7R7 }
- ↳ O.8R.6 mentions about particulars of set-off to be given in written statement and effect of set-off.
- ↳ O.8R.10 : Specifically enables the court to pronounce judgment in case the defendant fails to file written statement (as required under R1019)
- ↓
Discretionary or subsequent pleadings.

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↳ Where there are mutual debts between the plaintiff and the defendant, one debt may be settled against another: SET OFF.
It is adjustment of defendant's claim with the plaintiff's claim, equitable defence to the whole or to a portion of a plaintiff's claim, reciprocal ascertainment of debts between the parties, right of a debtor to balance mutual debts with a creditor.

↳ Set-off can be claimed in a recovery of money suit.

LEGAL SET OFF

- Sum must be ascertained
- Claim need not originate from the same transaction
- can be claimed as a right by the defendant
- The court is bound to adjudicate upon the claim.
- court fee must be paid on set off amount and amount must not be time barred.

EQUITABLE SET OFF

- Sum need not be ascertained.
 - Claim must originate from the same transaction
 - No court fee is required
 - The amount may be time barred.
 - A time barred debt may be claimed by way of an equitable set off.
- [Gurjani Simha Jain v. Registrar General]

↳ If A and B sue C for £1,000, C cannot set off a debt due to him from A alone. It can be claimed by claimant only against the person who is under duty to pay.

↳ If A sues the partnership firm of B and C, £1,000. B dies leaving C surviving. A sues C for a debt of £1,500 due in his separate character. In this case, C may set off the debt of £1,000.

- ↳ If A and B sue C for recovery of £1,000. C has a debt due to him by A alone. Here, C cannot set off a debt due to him by A alone.
- ↳ A sues B on bill of exchange for £5,000. B holds a judgment against A for £1,000. The two claims being both definite pecuniary demands may set off.
- ↳ Set off and counter claim cannot be exceeding the pecuniary limits of the jurisdiction of the court as provided in R. 6 and R 6A of O.V.III CPC.
- ↳ O.V.III R 6A: counter claim can be set up ^{NOT ONLY} in money suits only, ^{BUT IN} suits for recovery of damages only, all suits.

↳ If a defendant sets up a counter claim in a suit, the same may be proceeded with even if the suit by the plaintiff is stayed, plaintiff discontinued the suit, suit is dismissed.

[O 8 R 6 D]

↳ O 8 R 6-A: counterclaim may be set up before the defendant has delivered his defence. A defendant may set up, by way of a counter claim against the claim of the plaintiff any right or claim in respect of the cause of action accruing to him.

↳ A claim by way of a set off or a counter claim shall be treated as a separate suit.

↳ counterclaim is deemed to have been instituted on the date on which the counter-claim is made in court.

↳ Section 27 provides that summons to the defendant to be served on such date not beyond: Thirty days from the date of institution of the suit.

↳ O.5: Issue and service for summons

↳ When there are more than one defendants, the service of summons shall be made on each one of the defendants individually.

↳ Dasti Summons for serving on the defendant(s) can be given to the plaintiff by virtue of: OVR9A

Dasti service is a service of summons by the petitioner/plaintiff on the respondent/defendants, by a specific order by the court and not by registered post or through the process server of the court.

The provisions of Rules 16 and 18 shall apply to a summons personally served under this rule as if the person effecting service were a serving officer.

↳ Essentials of summons: Rules 1-2

• Every summons shall be signed by the judge or such officer appointed by him and shall be sealed with the seal of the court and must be accompanied by a plaint

O5R2: Every summons to be accompanied by copy of plaint or by a concise statement of permitted

↳ O.5 deals with summons to a defendant while O.16 deals with summons to witnesses.

No summons will be issued by the court if, at the time of presentation of a plaint, the defendant is present

and admits the plaintiff's claim.

- ↳ OVR 3: Appearance in person or by a pleader duly instructed and able to answer all material questions relating to the suit or by a pleader accompanied by some person able to answer all such questions. R 1(2)
- ↳ The court, however, may order the defendant or plaintiff to appear in person.

- ↳ Exemption from appearance in person Sections 132-33, Rule 4

No party shall be ordered to appear in person

- unless he resides (a) within the local limits of the court's ordinary original jurisdiction; (b) outside such limits, but at a place less than $\begin{bmatrix} 50 \text{ miles} \\ \text{or} \\ 200 \text{ miles} \end{bmatrix}$ [where public conveyance is available] from the courthouse.

- who is a woman not appearing in public (132)
- who is entitled to exemption under the code. (133)

- ↳ Mode of service of summons: Rules 9-30

- Personal or direct service: Rules 10-16, 18
- Service by court: Rule 9
- Service by plaintiff: R 9-A
- Substituted service: Rules 17, 19-20

- ↳ Substituted service means the service of summons by a mode which is substituted for the ordinary mode of service of summons. There are two modes of substituted

service:-

- where the defendant or his agent refuses to sign the acknowledgment
- where the serving officer, after due and reasonable diligence

cannot find the defendant who is absent from his residence at the time of service of summons and there is no likelihood of him being found at his residence within a reasonable time and there is no authorised agent nor any other person on whom service can be made, the service of summons can be made by affixing a copy on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain.

↳ If the court is satisfied, either on the affidavit of the serving officer or on his examination on oath, that the summons has been duly served, it may either declare that the summons has been served or make further enquiry as it thinks fit. [R19]

↳ Under R17, the service is effected without an order of the court by affixing a copy of the summons on the house of the defendant and therefore declaration by the court about the due service is essential

↳ Where the court is satisfied that the defendant avoids service or for any other reason the summons cannot be served in the ordinary way, it can be affected by:-

- ① affixing a copy in some conspicuous place in the court
- ② some conspicuous part of the house in which defendant is known to have last resided,
- ③ carried on business or personally worked for gain.
- ④ in any other manner the court thinks fit



↳ Where defendant is absent from his residence at the time when service of summons is sought to be effected, service may be made on defendant's adult son i.e. adult member of the family or any adult female member of the family.

A servant is not a member of the family. COVER 15

↳ Under OVR 9(3): The expenses for the services of summons to the defendant have to be born by the plaintiff.

↓
delivering
or
transmitting
a copy by registered post or
by any courier service approved
by High court or by any other court
or through any other means of
transmission of documents
such as fax, electronic mail service.

↳ OVR 20: Where a defendant was avoiding service deliberately, the court ordered service by advertisement in a newspaper, but it did not order to affix the summons in the court house or at the defendant's house also. This procedure adopted is regular.

↳ OVR 25 Provision 1: Where the defendant resides in Pakistan, then the summons shall be sent by post to defendant together with a copy thereof for service on defendant to any court in Pakistan (not being the High court) having such jurisdiction in the place where defendant resides.

↳ O29R2 CPC, where the suit is against corporation, summons may be served upon:-

(i) secretary of the corporation
(ii) The director or any other principal officer of the corporation.

(iii) OR By leaving it or sending it to by post addressed to the corporation at the registered office or if no registered office the place where the corporation carries on business

→ NO provision in CPC which allows service on party company.

↳ As per OVR30(1), letter may be substituted for summons where the defendant is, in the opinion of the court, of a rank entitling him to such mark of consideration.

↳ O9R5(b): If a suit is dismissed because the plaintiff fails to apply for fresh summons, after summons has been returned unserved, within the prescribed period of time he can bring a fresh suit subject to law of limitation.

↳ If the summons issued to the defendant is returned unserved and the plaintiff fails to apply for a fresh summons to the defendant within 7 days of return, the suit will be dismissed under O9R5 CPC.

↳ As per O9R2, when the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay service charges. The court may either dismiss the suit or may grant time to the plaintiff to deposit the service charges.

↳ As per Section 32 CPC, the court may compel the attendance of any person to whom a summons has been issued under Sec. 30 and for that purpose:-

- Issue a warrant for his arrest
- attach and sell his property
- Impose a fine upon him not exceeding five thousand rupees
- order him to furnish security for his appearance and in default commit him to the civil prison.

S. 27: Summons to defendants

S. 28: Service of summons where defendant resides in another State

S. 29: Service of foreign summonses

S. 30: Power to order discovery, inspection, production, impounding and return of documents, order any fact to be proved by affidavit.

S. 31: Summons to witness

The provisions in Sections 27, 28 and 29 shall apply to summonses to give evidence or to produce documents or such other objects as other material objects.



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